IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORIGINAL SIDE
Arbitration Application No.123 of 2005

M/s.Utility Premises Pvt.Ltd. Applicants
Vs.
M/s.Shree Ram Mills Ltd. Respondents

Mr.Harish Malhotra with Mr.Arif Bookwala and Ms.Leena Mirashi i/b M/s.Shah & Sanghavi for applicants.

Mr.P.A.Sawant i/b M/s.Khaitan & Jaykar for respondents.

CORAM: B.H.MARLAPALLE,J.

August 11, 2006.

P.C.

1. This is an application filed under Section 11 of the Arbitration and Conciliation Act, 1996 for the appointment of the sole arbitrator to adjudicate upon the disputes arising from the agreement dated 27th April 1994 signed between the parties.

2. The petitioner is a company incorporated under the Companies Act, 1956 with its registered office at 1st floor, La Kozy Mansion, 21, Chowpatti, Sea Face, Mumbai 400 007. The respondent is seized and possessed or otherwise entitled to all that piece and parcel of land lying and being at Worli Estate of Lower Parcel at G.M.Bhosle Marg admeasuring 67,785.50 sq.mtrs. (for short referred to as "the larger

property") and the said company became a sick industrial unit sometime in the year 1987 under the Sick Industrial Companies (Special Provisions) Act, 1985. It was ordered to be wound up in the year 1994 and on its appeal a rehabilitation scheme was worked out where the IDBI was appointed as an operating agency under the scheme. The Asset Sale Committee approved the sale of 1,20,000 sq.ft. FSI of the respondent-company to the petitioners for a total consideration of Rs.21,60,00,000/- (Rupees twenty one crores sixty lakhs only) and accordingly the agreement was executed between the parties on 27th April 1994 whereby the respondent agreed to sell to the petitioner and permitted the petitioner to develop FSI of 1,20,000 sq.ft. It is alleged by the petitioners that in spite of the fact that the respondent received Rs.25,64,00,000/- (Rupees twenty five crores sixty four lakhs only) it did not make available to the petitioners FSI to the extent of 1,20,000 sq.ft. The petitioners, therefore, issued an Advocate's notice dated 11th June 2002 suggesting the names of two retired Judges of the Supreme Court so as to appoint one of them as the sole arbitrator to settle the dispute between the parties in terms of clause 24 of the agreement dated 27th April 1994 and

the said notice was received by the respondent on 14/6/2002. A Memorandum of Understanding came to be signed between the parties on 19/1/2005 and consequently a sum of Rs.10,00,000/- (Rupees ten lakhs only) came to be paid to the petitioner by the respondent as per the terms of the said MOU and as the respondents were not willing to implement the MOU, the petitioners returned the said sum to the respondent. Finally by their letter dated 24/5/2005 the petitioners invoked the arbitration clause in the agreement dated 27th April 1994 and intimated the name of Hon'ble Shri Justice S.C. Agarwal (Retd.) as their sole arbitrator. As there was no response from the respondent-company this application has been filed.

3. The respondent has filed affidavit-in-reply and opposed this application on the following grounds:

(a) There is no live dispute between the parties and, therefore, in view of the law laid down in the case of SBP & Co. Vs. Patel Engineering Ltd. **[2005 (8) SCC 618]** the application is not maintainable;

(b) An application under Section 9 of the Act came to be filed before this Court which was registered as Arbitration Petition (Lodg.) No.346 of 2001 and the same was rejected on 4/5/2001 and, therefore, the principles of res judicata or on the principles analogous thereto, the petitioners' claim cannot be entertained;

(c) The first notice invoking the arbitration clause was issued on or about 11/6/2002 and this application has been filed beyond three years from the said date and, therefore, it is hit by limitations.

4. There is no doubt that Arbitration Petition (Lodg.) No.346 of 2001 was filed under Section 9 of the Act by the petitioners-company before this Court and the same was rejected as not maintainable. If the said order dated 4/5/2001 passed by this Court is perused, it is clear that Arbitration Petition (Lodg.) No.346 of 2001 was filed seeking an order of appointment of the Court Receiver in respect of an area admeasuring 2500 sq.mtrs of the land as

described in Exhibit G and also for an order of injunction restraining the respondents, their servants, agents and/or any one claiming through or under the respondents from in any manner utilising or disposing off and/or alienating or encumbering or transferring or parting with the possession of or creating third party, right, tile and interest and/or carrying out or continuing any development or construction on the property described in Exhibit G. It is required to be considered whether the order passed by this Court on 4/5/2001 had in any way dealt with the disputes arising from the agreement dated 27/4/1994 and it appears that the said arbitration petition did not relate to the property covered by the agreement dated 27/4/1994. The following observations in para 6 of the order dated 4/5/2001 speak for themselves:

> "6. The petitioners are seeking to take action in 2001 in respect of the agreement which is cancelled as far back as in 1996, when the document Exhibit O does not entitle them to seek any relief."

It is clear from the order dated 4/5/2001 passed by

this Court that the agreement dated 18/7/1994 (Exhibit H to the said petition) which was the subject matter of the said petition, related to the piece of land admeasuring 2500.72 sq.mtrs. which was not in any way covered by the agreement dated 27/4/1994 which covered the FSI of 86,725 sq. ft. This agreement dated 18/7/1994 was to fulfil the commitment of FSI of 1,20,000 sq. ft. and thus the arbitration petition decided by this Court on 4/5/2001 related to the second agreement dated 18/7/1994 and that agreement was cancelled by the subsequent agreement dated 2/6/1996. Clause 5 of the agreement dated 2/6/1996 reads as under:

> "It is hereby expressly confirmed, agreed and declared that UTILITY and / or BHUPENDRA shall have no right or claim whatsoever in respect of the said property of SRM as more particularly described in First Schedule hereto save and except in respect of the F.S.I. of 86,725/= sq.ft. only on the terms and conditions contained in the Agreement dated 27.4.1994 as also the Agreement dated 9.11.1994 as modified above."

5. The respondents' contention that this application is hit by the principle of res judicata or any analogous principle is, therefore, unsustainable and the same is hereby rejected.

6. On the issue of limitations it has been pointed out that after the notice dated 11th June 2002 on the basis of clause 24 of the agreement dated 27/4/1994 was issued invoking the arbitration clause, the parties re-negotiated and signed a Memorandum of Understanding on 19th January 2005 and clause 4(ii)(c) and (d) of the said MOU read as under:

> "(c) On execution of the Agreements agreeing to allot premises having an aggregate super built up (saleable area) of 6,030 sq.ft. in the building which is being constructed on the said land given pursuant to the Agreement dated 27th April, 1994 with Shree Ram Mills Limited and/or its nominee without seeking any further payment in respect thereof. Such premises to be allotted shall be on the 8th floor to 15th floor in the building under construction.

(d) S.R.M. have confirmed the receipt of full consideration/payment towards the said FSI of 86725 sq.ft. as per agreement dated 27th June 1996. It is agreed and confirmed that utility/BCFL have full right to develop and sale the said FSI to its buyers, SRM will execute the necessary conveyance deed as per the agreement dated 27th June 1996. SRM will provide all cooperation for the development of 86725 sq.ft. area as per agreement dated 27th April 1994 and 27th June 1996, on fulfilment of all obligations by both the parties as mentioned in this MOU."

The petitioners by their letter dated 8/3/2005 forwarded the cheque for Rs.10 lakhs to the respondent thereby returning the said amount consequent to the decision to withdraw from on going negotiations for out of Court settlement with respect to the various transactions which were subject matter of Writ Petition No.9572-73 of 2003 pending before the Delhi High Court. The Memorandum of Understanding dated 19/1/2005 clearly shows that the parties had renegotiated on different issues including the agreement dated 27/4/1994 and,

therefore, it cannot be said that the instant application has been filed belatedly or it is barred by limitations.

7. Having regards to the law laid down in the case of SBP & Co. (Supra) and the fact that the present application is in respect of the agreement dated 27/4/1994 and not in respect of the subsequent agreement dated 18/7/1994 which has been cancelled by the agreement dated 2/6/1996, it cannot be accepted that no live claim of the petitioners exists against the respondent-company, calling for adjudication in arbitration proceedings.

8. Hence the preliminary objections raised by the respondent-company on the maintainability of this application are hereby rejected.

9. The arbitration clause in the contract between the parties i.e. the agreement dated 27/4/1994 speaks about an arbitral tribunal and, therefore, it is necessary for the respective parties to appoint a panel arbitrator and these two panel arbitrators in turn will have to appoint a presiding arbitrator.

10. The names of some of the retired High Court Judges were placed before the respective parties today and the petitioner-company has agreed for the appointment of Hon'ble Mr.Justice A.C.Agarwal (Retd.) as its panel member whereas the respondent - company has agreed to appoint Hon'ble Mr.Justice P.S. Shah (Retd.) as its panel member and, therefore, it is ordered accordingly. The Panel Arbitrators are requested to meet within a period of four weeks from today and finalise the name of the Presiding Arbitrator who should be a Retired Judge of the Supreme Court.

11. The application is disposed off accordingly and a copy of this order be forwarded to Hon'ble Mr. Justice P.S.Shah (Retd.) and Hon'ble Mr. Justice A.C. Agarwal (Retd.). The appointment of the Arbitrators in no way will affect the rights of the respective parties.

(B.H.MARLAPALLE,J.)